RECORD AND BRIEFS

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No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,
Petitioners,

v.

HEBEI WELCOME,
PHARMACEUTICAL CO. LTD., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF PROFESSORS WILLIAM S. DODGE AND PAUL B. STEPHAN IN SUPPORT OF PETITIONERS

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL, LLP
1325 G St. N.W., Ste. 500
Washington, D.C. 20005
202-652-4511
jmassey@masseygail.com

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether the Second Circuit, in conflict with the decisions of three courts of appeals, erred in exercising jurisdiction under 28 U.S.C. § 1291 over a pre-trial order denying a motion to dismiss following a full trial on the merits.

2. Whether a court may exercise independent review of an appearing foreign sovereign's interpretation of its domestic law (as held by the Fifth, Sixth, Seventh, Eleventh, and D.C. Circuits), or whether a court is "bound to defer" to a foreign government's legal statement, as a matter of international comity, whenever the foreign government appears before the court (as held by the opinion below in accord with the Ninth Circuit).

3. Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury.

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of Professors William S. Dodge and Paul B. Stephan.[1]

Professor Dodge is Martin Luther King, Jr. Professor of Law at the University of California, Davis, School of Law.[2] From 2011 to 2012, he served as the Counselor on International Law to the Legal Adviser at the U.S. Department of State. He is Co-Reporter for the American Law Institute's *Restatement (Fourth) of Foreign Relations Law of the United States* and a member of the Secretary of State's Advisory Committee on International Law. He is the author of *International Comity in American Courts*, 115 Colum. L. Rev. 2071 (2015), among other publications.

Professor Stephan is John C. Jeffries, Jr., Distinguished Professor of Law and John V. Ray Research Professor of Law at the University of Virginia School of Law. From 2006 to 2007, he served as Counselor on International Law to the Legal Adviser at the U.S. Department of State. He is Co-Coordinating Reporter for the American Law Institute's *Restatement (Fourth) of Foreign Relations*

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[1] Pursuant to Rule 37.2(a), amici certify that counsel of record for the parties received timely notice of the intent to file this brief and have granted consent, which is on file with the Clerk of the Court. Pursuant to Rule 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or its counsel made such a monetary contribution.

[2] Affiliations are listed for identification purposes only.

Law of the United States. He is the author of *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 Va. L. Rev. 17 (2014), among other publications.

Amici have academic expertise and a strong interest in the proper interpretation of U.S. law doctrines based on international comity.

SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari to address at least the third question presented: "Whether a court may abstain from exercising jurisdiction on a case-by-case basis, as a matter of discretionary international comity, over an otherwise valid Sherman Antitrust Act claim involving purely domestic injury."[3] This is a question of exceptional importance on which the Second Circuit's decision conflicts with the decisions of this Court. The question has also divided the lower courts and has significant implications for other doctrines of U.S. law based on international comity.

Plaintiffs alleged that Defendants and their co-conspirators established a cartel to fix the prices of vitamin C exported to the United States in violation of Sherman Act § 1. App. 157a. Defendants moved to dismiss under the act of state doctrine, the doctrine of foreign sovereign compulsion, and principles of international comity. App. 162a. The district court denied the motion to dismiss and, after further discovery, denied Defendants' motion for summary judgment. App. 56a. At trial, the jury found

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[3] Amici express no views on the other two questions presented.

Defendants liable for violating Section § 1 of the Sherman Act. The district court awarded Plaintiffs approximately $147 million in damages and permanently enjoined Defendants from further violations of the Sherman Act. App. 2a.

On appeal, the Second Circuit declined to address the act of state doctrine or the doctrine of foreign sovereign compulsion. App. 37a-38a. Instead, the court of appeals held that "principles of international comity required the district court to abstain from exercising jurisdiction in this case." App. 3a. The Second Circuit reached this conclusion by applying a "multi-factor balancing test," App. 14a-15a, developed and applied by several courts of appeals during the 1970s and 80s. *See Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976).

The Second Circuit failed to honor this Court's instruction that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). This Court has recognized certain exceptions to this obligation, but none applies in this case.

In support of its multi-factor balancing test, the Second Circuit relied on this Court's refusal to reject international-comity abstention outright in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 797-99 (1993). *See* App. 17a. But the Second Circuit ignored this Court's subsequent rejection of case-by-case balancing as "too complex to prove workable." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004); *see also RJR Nabisco, Inc. v.*

European Community, 136 S. Ct. 2090, 2108 (2016) (refusing to "permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign"); *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247, 259 (2010) (criticizing the "methodology of balancing interests"). Lower courts are divided over whether they may abstain from exercising jurisdiction on a case-by-case basis as a matter of international comity.

The Second Circuit's discretionary abstention doctrine also threatens to supplant more narrowly tailored doctrines of international comity historically favored by this Court, such as the doctrine of foreign sovereign compulsion and the act of state doctrine. The doctrine of foreign sovereign compulsion requires that the defendant face severe sanctions for failing to comply with foreign law and has sought to avoid the conflict in good faith. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 222 (AM. LAW INST., Tentative Draft No. 2, 2016).[4] The Second Circuit expressly held, however, that neither requirement applied under its comity balancing test. App. 30a-33a. The act of state doctrine is limited to claims that would require the court to declare invalid the official act of a foreign sovereign. *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). The Second Circuit's discretionary abstention doctrine is not so limited. App. 31a. If the decision below is allowed to stand, the more specific doctrines this

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[4] Although amici serve as Co-Reporters for the Fourth Restatement, they file this brief in their individual capacities. This brief should not be taken to represent the views of the American Law Institute.

Court has developed to mediate relationships with foreign legal systems will increasingly find themselves replaced by a "vague doctrine of abstention," *Kirkpatrick*, 493 U.S. at 406, of the sort that this Court has consistently rejected.

Accordingly, this Court's plenary review is amply warranted.

ARGUMENT

I. THE SECOND CIRCUIT'S DISCRETIONARY ABSTENTION DOCTRINE CONFLICTS WITH THE DECISIONS OF THIS COURT

1. This Court has repeatedly emphasized that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (quoting *Colorado River*); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (same); *Sprint Communications, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (same). This obligation is subject to certain exceptions. Federal courts may decline to hear a case "where the relief being sought is equitable in nature or otherwise discretionary," such as an action for declaratory judgment. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721 (1996). In actions at law, federal courts may stay their proceedings in deference to other federal courts, *see Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), and may decline jurisdiction in favor of state courts under narrowly circumscribed abstention doctrines and in other "exceptional" circumstances. *Colorado River*, 424 U.S. at 818. Federal courts may also decline jurisdiction in favor of foreign courts under the doctrine of *forum non*

conveniens, provided that "there exists an alternative forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

None of these exceptions to the federal courts' obligation to exercise jurisdiction applies in this case. Plaintiffs' Sherman Act claim was an action for damages, although the district court also granted injunctive relief. The Second Circuit did not order abstention in favor of another federal or state court. Defendants did not seek dismissal under the doctrine of *forum non conveniens*. Indeed, the Second Circuit conceded that "Plaintiffs may be unable to obtain a remedy for Sherman Act violations in another forum." App. 34a. The court of appeals' suggestion that "complaints as to China's export policies can adequately be addressed through diplomatic channels and the World Trade Organization's processes," App. 34a-35a, ignores Plaintiffs' rights to seek compensation for antitrust injuries under federal law and the federal courts' obligations to decide those claims. As Justice Scalia noted, writing for a unanimous Court in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990), "[t]he short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Id.* at 409.

2. It is clear that the district court had subject matter jurisdiction in this case and that Section 1 of the Sherman Act reached the Defendant's conduct that caused substantial anticompetitive effects in the United States. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("[I]t is well established by now that the Sherman Act applies to

foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."); *see also F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004) ("[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is . . . reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.").

In the decision below, the Second Circuit nevertheless held that "principles of international comity required the district court to abstain from exercising jurisdiction in this case." App. 3a. To reach this conclusion, the Second Circuit relied on the "multi-factor balancing test," App. 14a-15a, developed by the courts of appeals in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976), and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979). The Second Circuit distilled those cases into a ten-factor test, which it referred to as the "comity balancing test." App.15a-16a.[5] Applying those factors to the

[5] The ten factors are: "(1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted,

facts of this case, *see* App. 33a-37a, the Second Circuit concluded "that China's 'interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law.'" App. 37a (quoting *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 450 (2d Cir. 1987)).

In *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), the petitioners raised a similar argument, but this Court found it unnecessary to decide whether a federal court may decline to exercise jurisdiction "under the principle of international comity." *Id.* at 797. Because the petitioners in *Hartford* did not claim that compliance with both U.S. and foreign law was "impossible," this Court reasoned that there was "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.* at 799.[6] The Second Circuit read *Hartford*

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whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue." App. 15a-16a (citing *Mannington Mills*, 595 F.2d at 1297-98; *Timberlane*, 549 F.2d at 614).

[6] In *Hartford Fire*, Justice Scalia argued in dissent that customary international law requires a balancing of factors in each case to determine if the exercise of jurisdiction is reasonable, relying on Section 403 of the Restatement (Third) of Foreign Relations Law. *See*

Fire "narrowly," "as suggesting that the remaining factors in the comity balancing test are still relevant to an abstention analysis." App. 17a. In so doing, the Second Circuit ignored this Court's subsequent decisions, which have repeatedly disapproved a discretionary, case-by-case approach.

In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), an antitrust case governed by the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a, respondents argued that courts could take "account of comity considerations case by case, abstaining where comity considerations so dictate." *Empagran*, 542 U.S. at 168. This Court rejected that argument, concluding that such a case-

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Hartford Fire, 509 U.S. at 818-19 (Scalia, J., dissenting). Amici submit that customary international law imposes no such obligation and that the question is rather one of international comity. The International Court of Justice has held that "the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*." *Jurisdictional Immunities of the State (Germ. v. It.)*, 2012 I.C.J. 97, 122 (Feb. 3) (quoting *North Sea Continental Shelf (Germ. v. Den.; Germ. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20)). Other jurisdictions have not followed a practice of case-by-case balancing. *See, e.g.*, *A. Ahlström Osakeyhtiö v. Comm'n* (*"Wood Pulp"*), 1988 E.C.R. 5193, ¶¶ 19-23 (European Court of Justice). In the absence of settled state practice, no customary-international-law obligation can exist. For this reason, the Restatement (Fourth) of Foreign Relations Law concludes that "state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 211, Reporters' Note 3 (AM. LAW INST., Tentative Draft No. 2, 2016).

by-case approach was "too complex to prove workable." *Id.* As an example of this unworkable, balancing approach, the Court cited *Mannington Mills*, *see id.*, one of the two cases from which the Second Circuit drew its multi-factor test. *See* App. 15a. The FTAIA does not apply in the present case because the antitrust claims involve import commerce. *See* 15 U.S.C. § 6a (limiting FTAIA to cases involving trade or commerce "other than import trade or import commerce"). But there is no reason to believe that a case-by-case comity approach is any more workable in antitrust cases not mediated by the FTAIA.

This Court has rejected a case-by-case approach to determine the geographic scope of other statutes as well. Considering the scope of Securities Exchange Act § 10(b) in *Morrison v. National Australia Bank, Ltd.*, 561 U.S. 247 (2010), the Court criticized the lower courts' "methodology of balancing interests," *id.* at 259, which had led to "the unpredictable and inconsistent application of § 10(b) to transnational cases." *Id.* at 260. Instead, this Court adopted a "clear test" that simply asks "whether the purchase or sale is made in the United States, or involves a security listed on a domestic exchange." *Id.* at 269-70. Just last Term, in *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), this Court considered the geographic scope of RICO, holding that two of its substantive provisions apply extraterritorially to the same extent as RICO's underlying predicate acts, *id.* at 2101-03, and that RICO's private right of action requires proof of domestic injury to business or property. *Id.* at 2111. The European Community asked this Court to consider the absence of international friction in cases where foreign

governments themselves were plaintiffs, but the Court refused to "permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign." *Id.* at 2108.

3. Before *Hartford Fire*, the courts of appeals were divided over whether they could abstain from exercising jurisdiction on a case-by-case basis as a matter of international comity. The Second, Third, and Ninth Circuits had embraced such discretionary authority, *see O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 451-52 (2d Cir. 1987); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 614-15 (9th Cir. 1976), while the Fifth and D.C. Circuits had rejected it. *See Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 948-55 (D.C. Cir. 1984); *Indus. Inv. Dev. Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876, 884 n.7 (5th Cir. 1982), *cert. granted, vacated, and remanded on other grounds*, 460 U.S. 1007 (1983). In *Hartford Fire*, this Court expressly declined to resolve the circuit split. *See Hartford Fire*, 509 U.S. at 798 ("We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct . . . , international comity would not counsel against exercising jurisdiction in the circumstances alleged here.").

Confusion has persisted in the lower courts since *Hartford Fire*. Like the Second Circuit in the decision below, the Ninth Circuit has continued to adhere to *Timberlane*. *See Metro Industries, Inc. v. Sammi Corp.*, 82 F.3d 839, 846 n.5 (9th Cir. 1996) (concluding

that *Hartford Fire* "did not question the propriety of the jurisdictional rule of reason or the seven comity factors set forth in *Timberlane I*."); *see also Mujica v. AirScan Inc.*, 771 F.3d 580, 600 (9th Cir. 2014) (concluding that *Hartford Fire* left unclear the application of international comity in other cases). Other Circuits, by contrast, have applied *Hartford Fire*'s effects test in antitrust cases without considering abstention on grounds of international comity. *See, e.g.*, *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 438-39 (6th Cir. 2012); *United States v. Anderson*, 326 F.3d 1319, 1329-30 (11th Cir. 2003); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).

4. Not only do the lower courts appear to be applying different approaches in different circuits, but the very nature of the Second Circuit's case-by-case approach invites inconsistency in the application of U.S. antitrust law. The Second Circuit identified ten different factors for district courts to weigh in each case, including the "[d]egree of conflict with foreign law or policy," the "[r]elative importance of the alleged violation of conduct here as compared with conduct abroad," and the "[p]ossible effect upon foreign relations if the court exercises jurisdiction and grants relief." App. 15a-16a; *see supra* note 5 (listing all ten factors). The Second Circuit further held that a district court's decision whether to abstain on international comity grounds should be reviewed only for abuse of discretion. App. 12a. Although the court of appeals concluded in this case that "the factors clearly weigh in favor of U.S. courts abstaining from asserting jurisdiction," App. 33a, reasonable minds may differ. Under the Second Circuit's comity balancing test, the application of U.S. antitrust law

will not turn simply on the existence of substantial intended effects in the United States, *see Hartford Fire*, 509 U.S. at 796, but also on the district judge's assessment of "foreign law or policy" and U.S. "foreign relations." As this Court repeatedly has observed, however, the judiciary generally lacks the capacity to undertake such assessments without guidance from the political branches. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (stating that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("[T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.").

II. THE SECOND CIRCUIT'S DISCRETIONARY ABSTENTION DOCTRINE THREATENS TO SUPPLANT MORE NARROWLY TAILORED DOCTRINES OF INTERNATIONAL COMITY

Rejection of the Second Circuit's "comity balancing test," App. 15a-16a, would not deprive the lower courts of the tools needed to manage interactions with foreign legal systems. In fact, U.S. law contains a wide range of doctrines to manage such interactions. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015). In this case, defendants invoked two such doctrines—the doctrine of foreign sovereign compulsion and the act of state doctrine. Each of these doctrines has specific requirements and limits, requirements and limits

that the Second Circuit's discretionary abstention doctrine would effectively render irrelevant.

1. This Court has recognized the doctrine of foreign sovereign compulsion in the context of U.S. court orders for the production of evidence. *See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958). *Rogers* held that dismissal of a complaint was too harsh a sanction for noncompliance with a pretrial production order "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* at 212. This Court has not found it necessary to decide whether foreign sovereign compulsion is a valid defense to antitrust claims, *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (noting that compliance with both U.S. and foreign law was not "impossible"); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986) ("Our decision makes it unnecessary to reach the sovereign compulsion issue."); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) (noting that there was "nothing to indicate that [Canadian] law in any way compelled discriminatory purchasing"), but lower courts have recognized the doctrine as a defense in antitrust cases. *See, e.g.*, *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1293-94 (3d Cir. 1979); *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 736 (S.D.N.Y. 1997); *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1304 (D. Del. 1970); *see also* Department of Justice & Federal Trade Commission, Antitrust Guidelines for International Enforcement and Cooperation § 4.2.2 (2017) (recognizing foreign sovereign compulsion defense to antitrust claims).

Where courts have recognized the doctrine of foreign sovereign compulsion, they have generally imposed two requirements: (1) that "the person in question appears likely to suffer severe sanctions for failing to comply with foreign law"; and (2) that "the person in question has acted in good faith to avoid the conflict." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 222 (AM. LAW INST., Tentative Draft No. 2, 2016). With respect to the requirement of a severe sanction, this Court noted in *Rogers* that "that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign." *Rogers*, 357 U.S. at 211; *see also Mannington Mills*, 595 F.2d at 1293 ("It is necessary that foreign law must have coerced the defendant into violating American antitrust law."). With respect to the requirement of good faith, *Rogers* emphasized "petitioner's extensive efforts at compliance" showing that its noncompliance "was due to inability fostered neither by its own conduct nor by circumstances within its control." *Rogers*, 357 U.S. at 211; *see also Interamerican*, 307 F. Supp. at 1304 (citing "uncontradicted evidence" that defendants "acted in good faith before and after the ban").

The Second Circuit's discretionary abstention doctrine would supplant the more narrowly tailored doctrine of foreign sovereign compulsion. Before abstaining on grounds of international comity, the court of appeals did not require a showing that the Defendants would be likely to suffer severe sanctions or even that the Defendant's conduct had been compelled. Instead, the court held that "[e]ven if Defendants' specific conduct was not compelled by

[Chinese law], that type of compulsion is not required" under the comity balancing test. App. 32a. Neither did the court of appeals require a showing that the Defendants had acted in good faith to avoid the conflict. Instead, the court held that "[w]hether Defendants had a hand in the Chinese government's decision to mandate some level of price-fixing is irrelevant" under the comity balancing test. App. 31a. By making dismissal of an antitrust claim as a matter of international comity available without a showing of either severe sanctions or good faith, the Second Circuit's abstention doctrine effectively makes the doctrine of foreign sovereign compulsion obsolete.

2. This Court has also recognized limits on the act of state doctrine. That doctrine provides that, "[i]n the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will assume the validity of the official act of a foreign sovereign performed within its own territory." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 221(1) (AM. LAW INST., Tentative Draft No. 2, 2016). Most significantly for this case, this Court unanimously held in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990), that the act of state doctrine applies only when a suit "requires the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *Id.* at 405 (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918)). *Kirkpatrick* emphasized that "[t]he act of state doctrine is not some vague doctrine of abstention," *id.* at 406, and that "[c]ourts in the United States have the power, and ordinarily the

obligation, to decide cases and controversies properly presented to them." *Id.* at 409.

The Second Circuit's comity balancing test is precisely the sort of "vague doctrine of abstention" that this Court rejected in *Kirkpatrick*. *Id.* at 406. Although the court of appeals did not reach Defendants' act of state defense, App. 37a-38a, the court did rely on one of its own pre-*Kirkpatrick* act of state decisions to support the comity balancing analysis. In considering the relevance of Defendants' conduct in establishing the Chinese export regime, the Second Circuit reasoned that "inquiring into the motives behind the Chinese Government's decision to regulate the vitamin C market in the way it did is barred by the act of state doctrine." App. 31a (citing *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 452 (2d Cir. 1987)). Under *Kirkpatrick*, however, the fact that a claim requires "imputing to foreign officials" even "an unlawful motivation," *Kirkpatrick*, 493 U.S. at 401, is not sufficient to invoke the act of state doctrine. Rather, the act of state doctrine applies only when a suit "requires the Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *Id.* at 405 (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918)). Under the Second Circuit's approach, the correct application of the act of state doctrine becomes irrelevant. Although the act of state doctrine is limited to claims that require a U.S. court to declare invalid the official act of a foreign sovereign, the Second Circuit's discretionary abstention doctrine is not.

* * *

At the end of its opinion, the Second Circuit noted: "Because we reverse and remand for dismissal on the basis of international comity, we do not address the act of state, foreign sovereign compulsion, or political question defenses." App. 37a-38a.[7] If the decision below is permitted to stand, this is likely to become an increasingly frequent disposition. Discretionary abstention as a matter of international comity may ultimately come to supplant the more narrowly tailored international-comity doctrines that this Court has developed.

The Second Circuit's comity balancing test invests district courts with essentially unreviewable discretion to dismiss federal claims without having to satisfy the more exacting requirements of the act of state doctrine and the doctrine of foreign state compulsion. It replaces these judicially administrable doctrines with case-by-case assessments of the "[d]egree of conflict with foreign law or policy" and the "[p]ossible effect upon foreign relations," App. 15a-16a, assessments that district judges are ill-suited to make.

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[7] If this Court grants the petition for certiorari and reverses, it should remand to allow the Second Circuit to address these defenses in the first instance.

CONCLUSION

For the reasons above, amici respectfully urge that the petition for certiorari be granted.

Respectfully submitted,

JONATHAN S. MASSEY
Counsel of Record
MASSEY & GAIL, LLP
1325 G St., N.W., Ste. 500
Washington, D.C. 20005
Tel: (202) 652-4511
jmassey@masseygail.com

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